IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA

CRIMINAL MISC. APPLICATION (MAIN) NO. 234 OF 2006

Shri Umesh Redkar,
S/o. Shri Digambar Redkar,
Major, married, Indian National,
Service, Neeta Sarees, Neelkamal Arcade,
Dr. A.B. Road, Panaji Goa,
and r/o. G-8, Ramakant Apartments,
18th June Road, Panaji-Goa. .... Appellant

Versus

M/s. Raghurai Tamba,
A Partnership firm, duly registered
under the Indian Partnership Act,
Having office at 'Parimal',
Altinho, Panaji, Goa and through Its Partner,
Shri Raghurai Tamba,
S/o Shri Rama Porob Tamba,
aged 68 years, R/o Parimal,
Altinho, Panaji Goa. .... Respondent

Shri Rohit Bras De Sa, Advocate for the Appellant.
Shri S. D. Padiyar, Advocate for the Respondent.

CORAM: **N. A. BRITTO, J.**

DATE: **26th July, 2006**

ORAL ORDER

In this petition filed under Section 482 of Criminal Procedure Code, 1973 the accused has assailed the order dated 23/02/2003 of the learned JMFC, Panaji, allowing the re-examination of the Complainant.

2. The affidavit in evidence of the Complainant was filed on 31/03/2005 and the Complainant was cross-examined on 13/01/2006. There is no dispute that the accused had agreed to purchase from the Complainant two shops for Rs. 27,67,155/- under written agreement dated 26/02/2001. As per the Complainant the accused had issued a post dated cheque dated 30/06/2001 for a sum of Rs. 6,67,155/- in favour of the Complainant. The balance amount of Rs. 21,00,000/- was payable upon handing over the possession of the said shops. There is no dispute that the accused has been handed over the possession of the said two shops after the Complainant received a sum of Rs. 21,00,000/- from the bankers of the accused namely Bicholim Urban Co-operative Bank. In fact the statement of the Complainant that the Complainant received from the accused through the said bank a sum of Rs. 21,00,000/- has not been disputed by the accused till date. In the course of the cross-examination of the Complainant, the Complainant stated that he had received a sum of Rs, 27,67,155/- from Bicholim Urban Co-operative Bank Ltd. which was paid by the accused to the Complainant by obtaining a loan from the bank. The case of the accused in the cross-examination of the Complainant, was that the accused had issued the subject cheque as collateral security towards the payment of the first instalment. To a suggestion put on behalf of the

accused, the Complainant stated that the total cost of the shop was Rs. 27,67,155/- plus the amount of the cheque. Thereafter the cross-examination was completed on that day and though the Complainant was not immediately re-examined, on the same day, an application came to be filed on behalf of the Complainant for re-examination of the Complainant, inter alia, stating that the Complainant had inadvertently deposed that the total cost of the shops was Rs. 27,67,155/- plus the amount of the cheque involved in the complaint. It was also stated on behalf of the Complainant that the Complainant had also inadvertently stated that he had received a sum of Rs. 27,67,155/- from Bicholim Urban Co-operative Bank. The Complainant had stated that in order to reconcile the above discrepancies, and in order to explain the statements in cross-examination in so far as the total cost of the shops and the amount received by the Complainant from Bicholim Urban Co-operative Bank and further to clear the ambiguity if any so far as the sum of Rs. 6,67,155/- due by the accused, the Complainant was required to be re-examined. . The said application was considered by the Court vide its order dated 23/02/2006 and the Complainant was allowed to be re-examined. It is against this order that the present petition has been filed, on behalf of the accused.

3. The learned trial Court in allowing the application for re-examination of the Complainant observed that the Complainant was seeking to recall and re-examine the Complainant to clear the ambiguity that had crept in in the evidence of the Complainant and therefore it could not be said that granting of the application would take away the admission which came in the cross-examination of the Complainant in favour of the accused.

4. Contending that re-examination should not be allowed to undo the effect of cross-examination Shri Bras De Sa, the learned Counsel on behalf of the accused has placed reliance on pages 3624 and 3625 of Sir John Woodroffe and Syed Amir Ali's Law Evidence, 16th Edition. Shri Bras De Sa has further submitted that it is not only once but twice that the Complainant had admitted in the cross-examination that the Complainant had received the total sum due by the accused towards the purchase of the said two shops in the sum of Rs. 27,67,155/-. On the other hand, it has been submitted by Shri Padiyar, the learned Counsel on behalf of the Complainant, that it was never the case of the Complainant that the value of the shops was Rs. 27,67,155/- plus Rs. 6,67,155/- for which the accused had issued the said cheque. It is also submitted by Shri Padiyar that in case the ambiguity between the examination in chief and cross-examination of

the complainant is not explained by way of re-examination, the Complainant would be prejudiced in the trial since there will be no opportunity for the Complainant to explain such ambiguity and the ambiguity in the ultimate analysis will go in favour of the accused. Shri Padiyar has placed reliance on the cases of ***Rajendra Prasad Versus Narcotic Cell*** ((1999) 6 SCC 110) and ***Ramsewak & Ors. Versus State of M.P.*** ((2004) 11 SCC 259)

5. At page 3624(supra) it is stated that:

> "the scope of recording the witness for re-examination in chief is, however, distinct. Under ordinary circumstances it is not necessary nor permissible to allow a witness once examined and dismissed by a party to be recalled for it is expected that the witness has been interrogated on all material points."

At page 3625(supra) it is stated as follows;

> "Where there no ambiguity or where there is nothing to explain, questions put in re-examination with the sole object of giving a chance to the witness to undo the effect of a lawyer not only tries to build up his case by establishing new facts but also tries to bring out contradictions in the evidence given in chief examination. One of the main objects of cross-examination is to test the veracity of the witness and the object would be frustrated if a witness is permitted to get over the effect of prevaricating

> and contradictory statements made by him in cross-examination, by taking recourse to the device of re-examination. So merely on the ground that the said statements appear to be contradictory, re-examination of a witness should not be allowed by the Court."

6. The above passage appears to have been taken from the observations of the Orissa High Court reported in 1990 69 CUT LT 411 at page 415.

7. In ***Rammi alias Rameshwar Versus State of M.P.*** ((1999) 8 SCC 649) the Supreme Court stated that the very purpose of re-examination is to explain matters which have been brought down in cross-examination. Section 138 of the Evidence Act outlays the amplitude of re-examination. It reads thus;

> "1. 138.
>
> 2. Direction of re-examination – The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon the matter."

The Supreme Court further proceeded to observe that there is an erroneous

impression that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination he has the liberty to put any question in re-examination to get the explanation. The Public Prosecutor should formulate his questions for that purpose. Explanation may be required either when the ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the Public Prosecutor feels that certain answers require more elucidation from the witness he has the freedom and the right to put such questions as he deems necessary for that purpose, subject of course to the control of the court in accordance with the other provisions. But the Court cannot direct him to confine his questions to ambiguities alone which arose in cross-examination. The Supreme Court further observed that even if the Public Prosecutor feels that new matter should be elicited from the witness he can so so, in which case the only requirement is that he must secure permission of the court. If the court thinks that such new matters are necessary for proving any material fact, courts must be liberal in granting permission to put necessary questions.

8. In the case of ***Rajendra Prasad Versus Narcotic Cell*** ((1999) 6 SCC 110) the Supreme Court considered what is a lacuna in a case of the prosecution with reference to Section 311 of the Code and inter alia observed that no party in a trial can be foreclosed from correcting errors and if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should magnanimous in permitting such mistakes to be rectified as the function of the court was not to count errors committed by the parties or to find out and declare who among the parties performed better.

9. In the case of ***Ramsewak & Ors. Versus State of M.P.*** ((2004) 11 SCC 259) the Supreme Court observed, inter alia, that in case there is one doubt as to the interpretation of the evidence, since the same was not clarified by the prosecution by way of re-examination, the benefit of doubt should go to the defence which had in specific terms taken a stand that the FIR came only after the dead body was recovered. That was the case where PW 1 referred to two reports, one which was inquest report and the other first information report .

10. As very Section 138 of the Evidence Act shows the very purpose

of re-examination is to explain matters referred to in cross-examination. The object is to give an opportunity to reconcile the discrepancies, if any, in between the statements in examination-in-chief and cross-examination or to explain any statement inadvertently made in cross-examination or to remove any ambiguity in the deposition or suspicion so cast on the evidence by cross-examination. Where there is no ambiguity or where there is nothing to explain, questions put in re-examination with the sole object of giving a chance to the witness to undo the effect of a previous statement should never be allowed. The re-examination should be confined to the explanation of matters arising out of the cross-examination and ordinarily the Counsel will not be allowed to question the witness on matters which should have been asked in examination-in-chief. I have already set out what the case of the complainant is. The case of the Complainant was that as per the agreement the two shops were to be handed over to the accused for a total consideration of Rs. 27,67,155/- out of which the Complainant had received a sum of Rs. 21,00,000/- from the accused from the Bank of the accused namely Bicholim Urban Co-operative Bank. The case of the Complainant was that the post dated cheque for the balance amount of Rs. 6, 67,155/- given by the accused was dishonoured and the accused had failed to pay the amount of the said cheque when called upon. The case of

the accused was that the said cheque was given as a collateral security towards the payment of the first instalment. Looked in that light, the statements of the Complainant in cross-examination cannot be considered as an admission. It is not certainly the case of the accused that the accused paid to the Complainant through his Bank Rs. 27,67,155/-. The statement of the Complainant that total cost of the shop was Rs. 27,67,155 plus the amount of the cheque was an ambiguity which had crept up in the cross-examination and which was required to be explained and in that view of the matter, the learned JMFC was within his discretion in allowing the application to re-examine the Complainant to explain the said ambiguity appearing in cross-examination of the Complainant. In case the application was not allowed the case of the Complainant would have been prejudiced while no prejudice will be caused to the accused in case the Complainant is allowed to be re-examined.

11. Viewed thus there is no case for interference in extraordinary jurisdiction. The petition dismissed. Parties to appear before the learned JMFC on the next date fixed.

N. A. BRITTO, J.

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